

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

FILED

MAR 03 2021

Matthew Thib
CLERK

FRANKLIN SANDOVAL NELSON,

Plaintiff,

vs.

JIM CROYMANS, Chief of Police, City of
Sisseton, in his official and individual capacities;
CITY OF SISSETON, A Municipal corporation
in the official and individual capacities;
KERRY M. CAMERON, former Roberts
County State's Attorney, in his official and
individual capacities; TIM ZEMPEL, Roberts
County Commissioner, in his official and
individual capacities; ROBERTS COUNTY, in
the official and individual capacities;
TIMOTHY J. CUMMINGS, Officer of the
Court, in his official and individual capacities;
ROBIN WEINKAUF, a/k/a/ Anger Skidmore
(Prosecutrix) in her official and individual
capacities; BRENT FLUKE, Warden, Mike
Durfee State Prison, in his official and individual
capacities; DARIN YOUNG, Warden, South
Dakota State Prison, in his official and
individual capacities; and ROBERT W.
DOOLEY, former Warden, Mike Durfee State
Prison, in his official and individual capacities;

Defendants.

1:21-CV-01007-CBK

ORDER

Plaintiff, a former prisoner, filed a complaint under 42 U.S.C. § 1983 claiming defendants, acting under color of state law, violated his rights under Brady¹, Bagley², Giglio³, the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution, subjected him to malicious prosecution and unlawful incarceration from 2014 to 2019, were deliberately indifferent, and engaged in gross negligence in connection with an overturned conviction. He has filed an application to proceed without the prepayment of fees.

¹ Brady v. Maryland, 373 U.S. 83 (1963).

² United States v. Bagley, 473 U.S. 667 (1985).

³ Giglio v. United States, 405 U.S. 150 (1972).

28 U.S.C. § 1915(a)(1) authorizes district courts to allow civil litigants to commence suit without the prepayment of the filing fee. However, other than in criminal cases, “[a]n *in forma pauperis* litigant’s access to the courts is a matter of privilege, not of right, and should not be used to abuse the process of the courts.” Williams v. McKenzie, 834 F.2d 152, 154 (8th Cir. 1987). The district courts are required to screen plaintiff’s claims to determine whether the action

- (i) is frivolous or malicious;
- (ii) fails to state a claim on which relief may be granted; or
- (iii) seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. § 1915(e)(2)(B).

In an effort to curb the flood of non-meritorious claims filed by prisoners, Congress passed the Prison Litigation Reform Act of 1995 (“PLRA”), 110 Stat. 1321-71, to “filter out the bad claims and facilitate consideration of the good.” Jones v. Bock, 549 U.S. 199, 203-04, 127 S.Ct. 910, 914, 166 L.Ed.2d 798 (2007). The PLRA introduced a three-strikes rule which provides:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). “In other words, for most three strikers, all future filing fees become payable in full upfront.” Bruce v. Samuels, 577 U.S. 82, 86, 136 S.Ct. 627, 630, 193 L.Ed.2d 496 (2016).

While plaintiff was incarcerated, he became subject to the three-strikes rule because, on at least three occasions, he filed a civil proceeding which was dismissed as frivolous, malicious, or for failure to state a claim upon which relief could be granted. Nelson v. Gilbertson, 3:17-CV-03023-CBK Doc. 30 (D.S.D. March 11, 2019). However, the three-strikes rule does not apply to a person who is not incarcerated at the time they filed their complaint. Haley v. United States Gov’t, 674 F. App’x 616 (8th Cir. 2017).

Plaintiff filed a declaration of poverty on a form applicable to prisoners. Those forms are usually accompanied by an inmate trust account report. The Court is unable to discern whether

plaintiff is entitled to proceed *in forma pauperis* under 28 U.S.C. § 1915 under the present record.

Now, therefore,

IT IS ORDERED that the Clerk of Courts shall provide to plaintiff an application to proceed in District Court without prepaying fees or costs, long form, AO 239. Plaintiff shall file a completed copy of AO 239 on or before March 31, 2021. Failure to do so may result in dismissal for failure to prosecute.

DATED this 26th day of February, 2021.

BY THE COURT:

A handwritten signature in black ink, reading "Charles B. Kornmann". The signature is written in a cursive, flowing style.

CHARLES B. KORNMANN
United States District Judge